No. 3902

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a Corporation), TUNGSTEN PRODUCTS COMPANY (a Corporation), MILL CITY DEVELOPMENT COMPANY (a Corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, Individually,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The appellant respectfully requests permission to file this reply brief in answer to the contentions of the appellees presented in their respective briefs, feeling that it will be some assistance to the Court in the consideration of the extensive record and particularly the many questions of fact presented by the record and by the contentions of counsel.

We have endeavored to answer only such matters as have been presented in the briefs of appellees so that the Court may be fully advised in the cause.

LORING'S POSITION.

Appellee Loring in a statement of facts in his brief at the outset urges, first, that Taylor made an election which in substance constitutes an estoppel in favor of Loring; second, that Loring was an innocent purchaser for value without notice; and, third, that Taylor accepted in payment of obligations due him as a creditor from the Tungsten Company, moneys which Loring paid in on account of the purchase price under his contract.

The record discloses that Taylor in June, 1919, at the Belmont Hotel in New York, two months before Loring entered into his contract, told Loring that he intended to commence action and to get the stock due him under the contract from Friedman and the other defendants. (Record, p. 354.) This Loring admits. (Record, p. 714.) Loring first negotiated for the property by letter of date July 21, 1919. (Record, pp. 649–700.) On August 10th Taylor wired Loring that he intended to commence suit and asked if Loring had an option on the property. Loring replied that he had. At this time Loring, however, had no option to purchase the property. He was merely negotiating and he obtained his contract August 16th and executed it on that date. (Record, pp. 357, 708.) The record therefore discloses affirmatively that Loring had notice of Taylor's equities and claims in the premises.

Loring's claim that Taylor made an election is based upon the telegram previously referred to in which Taylor advised that he intended to commence action for the stock or to recover damages. Loring contends that he made an investigation concerning Taylor's suit and finding that he had commenced an action for damages, went ahead with his option. Loring's contention in this regard, made by his counsel, is, however, not borne out by his own testimony. Loring testified he signed his contract August 16, 1919; he testified also that the contract was signed after receiving certain telegraphic advice from his attorney, Booth B. Goodman.

> "Q. Was that before or after there had come to your knowledge the contents of the two telegrams just offered in evidence?
>
> A. Afterwards." (Record, p. 708.)

We ask the Court to examine the telegrams referred to in the record, pp. 707, 708, and the Court will find that the telegrams are of date August 19, 1919, two days subsequent to Loring's execution of the contract. Loring entered into the contract with his eyes open. He had notice of Taylor's claim in June and again in August; he had made no payment; he was under no obligation to go forward with the undertaking; the only money he had paid was a loan made to the Company secured by tungsten concentrates (Record, p. 709).

After Loring entered into his contract on August 16th, the defendant, Nevada Humboldt Tungsten Mines Company, called a special meeting of stock-

holders to authorize the sale and the execution of deeds, bills of sale, etc. Notice of this meeting was mailed to stockholders on or after August 16th, and the meeting was called for the 23d of August, 1919, thus giving seven days' notice. Taylor filed a protest in writing against the holding of this meeting upon the grounds that it was unlawful and that the proper notice required by the statutes of Nevada had not been given. In spite of the protest, the meeting was held, the contracts ratified and the execution of deeds, conveyances and assignments directed and made. This meeting was a direct violation of Section 96 of the General Corporation Law of Nevada, Statutes of Nevada 1913, p. 65, which provides that a corporation may sell all of its assets upon a vote of not less than sixty per cent of its outstanding stock at a meeting of stockholders, notice of said meeting having been previously given by mailing to each stockholder *at least fifteen days before the meeting.* This provision of the statute is mandatory and the sale made thereunder was void. We call the Court's attention in that regard to

Davis vs. Monroe W. & L. Co., 31 So. 695;
Jones vs. Morrison, 16 N. W. 854;
Farwell vs. Houghton Copper Co., 8 Fed. 66;
Sumers vs. Glenwood, 86 N. W. 749.

On October 27th, 1919, Taylor commenced suit as a stockholder to set aside the transactions with Loring. (Record, p. 1139.) The defendants later recognized the defects of this meeting and called

a further meeting of stockholders to be held April 19, 1920. This time they gave the proper notice required by the Nevada statute. Before the meeting of April 19th could be held, this suit was commenced and an injunction was issued herein restraining the holding of said meeting.

Considering the transactions, the actions of the Company in failing to give proper notice, the prompt action of Taylor in commencing suit to set aside the action of the stockholders, it cannot be said that Taylor was guilty of laches or want of diligence in commencing and maintaining this suit. Counsel for Loring insisted that Taylor waited until two hundred and thirty-three thousand, three hundred thirty-three ($233,333) dollars had been paid in before filing this suit. This is not a fair statement of what took place. Loring executed his contract on August 16th, after notice of Taylor's claims. He must have had knowledge of the meeting of August 23d and of Taylor's protest against the transactions of that meeting. In spite of this notice and without legal obligation, he paid fifty thousand ($50,000) dollars on September 1st; prior to that time he had made no payment. With his eyes open and with full knowledge of all the facts, he made the succeeding payment of October 1st, fifty thousand ($50,000) dollars, and although Taylor, on October 27th, commenced action to set aside the conveyance to Loring, Loring continued to make further subsequent payments. We think it may be safely said that Loring was in nowise misled or prejudiced by any actions of Taylor that he could

not, as a reasonable, prudent business man, have avoided. Moreover, there was no fiduciary relationship between Taylor and Loring, and nothing in any of the transactions would call for any further notice to Loring than that which was given.

It is further urged by counsel for Mr. Loring that Taylor accepted, in settlement of another suit, money which Loring paid in on the purchase price of the Tungsten properties. What were the facts? Taylor commenced an action as a creditor against the Tungsten Company for money loaned; a writ of attachment was issued and to release this attachment a bond was given, and later, to release the bond, an agreement of settlement of the suit was entered into, by which Taylor agreed to accept seven thousand three hundred thirty-four and 4/100 ($7,334.04) dollars, the Tungsten Company giving its check for one thousand ($1,000) dollars as the first payment on December 15th to Norcross, Thatcher & Woodburn, attorneys for Taylor. At this time neither the plaintiff nor his attorneys had any knowledge that this money was a part of any payment made by Loring, and only obtained knowledge of the fact a few days prior to the making of the second payment of six thousand three hundred thirty-four ($6,334) dollars on February 9th. Taylor had no alternative but to accept the second payment of six thousand three hundred thirty-four ($6,334) dollars. He took it as a creditor and not as a stockholder. (Record, p. 669.) There was nothing in this transaction which could constitute defense to this action so far as Loring is concerned.

MISREPRESENTATIONS PRIOR TO APRIL 2d.

Counsel for the appellees in the briefs submitted to this Court have omitted any attempt to establish the truth of the representations as to the development of the mine and assays of ore contained in the letters and telegrams sent by the defendants to Taylor prior to April 2, 1919. They rely entirely on the finding of the Court that these representations were true. We shall not here undertake a repetition of the argument contained in our opening brief which we believe conclusively establishes that the trial Court fell into an error in holding that the representations in these various letters and telegrams related to a condition at a specific point instead of being average conditions. We have devoted a substantial portion of our opening brief (pages 20–36) to establishing this fact and yet the appellees neglect any answer whatsoever. That the Court did err in failing to hold that the conditions represented were the average of the vein through the whole of a specified drift, and not at a particular point in the drift, is clear; for example, from such statements as: "Number Two north 275 feet from shaft *average* width of vein nine feet, *ore milling* one per cent. Number Two south 100 feet beyond Bancroft sampling; *average* width of vein four and one-half feet, value of ore, one-half of one per cent." (Exhibit 3, p. 783.) Moreover, not one witness for the defendants testified that the representations contained in the letters and telegrams prior to April 2d were true.

The only justification attempted in the brief of opposing counsel is a reference to Taylor's letter of February 24th, Exhibit "L," in which Taylor pessimistically advises the defendants to close the mine down and tells them that he would not be interested in the purchase of their stock save at a lower price. He refers to the fact that the tungsten market is poor and shows that conditions are far from persuading him that he had a desirable proposition. Instead of this supporting the position of the appellees, it seems to us to demonstrate conclusively that it was the motive for the defendants' telegrams and letters to Taylor which followed from that time on and up to the date of the Denver conference on April 2d. (See Exhibits 6, 8, 9, 10 and 13.) These each show the defendants' purpose was to present to Taylor a sufficiently optimistic view of the developments of the mine to persuade him that the proposition was worth while so as to overcome his evident reluctance and to bring him once more to the rescue of this distressed proposition.

MISREPRESENTATIONS AT DENVER CONFERENCE.

The Denver conference on April 2d, between Poole, Nenzel and Murrish on the one hand and Taylor on the other, has been reviewed at considerable length in both briefs. It is conceded by all parties that whether or not at that conference Nenzel, Poole and Murrish represented to Taylor that the mine contained sixty thousand (60,000) tons of 1.75 per cent ore, depends on whether or not the testimony of Taylor, corroborated as it is, is over-

come simply by the denials of Nenzel, Poole and Murrish.

Counsel for the appellees have cited to this Court cases in support of the rule that where there is conflicting testimony in an equity case, this Court will not be eager to reverse. These same cases clearly also hold that findings are open to review when the trial Court misapprehended the evidence or has gone against the clear weight thereof, and that the credibility of the witnesses is open to attack. (See also American Rotary Valve Co. vs. Moorehead, 226 Fed. 202.)

We submit that the denials of Messrs. Murrish, Poole and Nenzel are not worthy of belief, and in support of that assertion we first direct the attention of this Court to the statement of the trial Judge (Record, p. 1429), that it is "unreasonable" that at this meeting in Denver there was no discussion of tonnage prior to the time whe the parties agreed upon the contract which is the subject of this lawsuit. It is rather for us to point out that the judgment of the trial Court on this point should be taken as to the credibility of these witnesses appearing before him, than for the appellees to take the position that this testimony is within the protection of the authorities they cite.

In addition, the testimony of these three individuals show their unreliability. In the first place, we have Murrish—an attorney guarding the interests and guiding the activities of these defendants, the man who drew the contract, Exhibit "C" (p. 488), and no doubt thoroughly familiar with the law of

false representations. He, as did Poole and Nenzel, testified that no discussion of tonnage occurred until *after* the contract, Exhibit "C," had been agreed upon. Is it not sufficient for us to again state that to the trial Court this testimony was unreasonable (p. 1429). That Murrish was willing to go to unbelievable lengths in behalf of himself and his associates is further established by his testimony concerning Exhibit "Z" (p. 933). (*Note,* the Record incorrectly refers to this as Exhibit "Q" on pp. 650, 651. See p. 654.) He testified that this paper, with its interlineations in handwriting, was prepared at the San Francisco conference early in June and had been the subject of discussion at that time (pp. 638, 650, 651, 653). If this were true, it had a manifest and important bearing on Taylor's position. It was conclusively demonstrated by the testimony of Mr. Thatcher, undisputed and uncontradicted in any way and unexplained by Murrish, that this paper did not come into existence until several months afterward, that it was prepared by Mr. Thatcher, and the interlineations were in his handwriting (pp. 732, 733). Concerning the testimony of Mr. Thatcher on this point, the leading counsel for the defense said: "So far as the witness (Thatcher) has gone, so far as my client is considered, we admit the fact as stated by you" (p. 733). The unavoidable inference can be left to this Court without further characterization of Mr. Murrish.

In view of these facts, carefully neglected by opposing counsel, what force remains to their arguments based on assertions that Mr. Murrish was a

trained lawyer of high character and standing in his profession? If he was so willing to testify under oath in the trial of this action to a matter which he must have known was false, and concerning which no mistake could have been made, is any credence to be given to his denial that the representations with which he and his associates are charged were not made? We ask the Court to read the testimony of Mr. Murrish which appears at page 769 et seq. of the Record, and particularly the trial Court's attitude toward it.

As to Poole—it will be recalled that Poole was unable to remember that he was charged at the San Francisco conference with having represented to Taylor in Denver, on April 2d, that the mine contained 60,000 tons of ore (p. 511). It made no impression on Poole, the university graduate, the mining expert of standing and responsibility, that he had been charged with a deliberate misrepresentation of the condition of the mine, in spite of the fact that the making of the representations was testified to affirmatively by three witnesses for the plaintiff, Messrs. Taylor, Bayless and Jackson, and admitted by his associates, Murrish and Nenzel. Surely no man of character and responsibility would fail to recollect so serious a charge directly relating to his own profession.

Poole is the witness who testified that never on any occasion at the Denver meeting did he represent or state or say that there was 60,000 tons of ore or any other ore or even one ton of ore of any value whatsoever in the mine. This in face of the undis-

puted fact that Taylor's letter suggesting the Denver conference requested them to bring *exact data* as to development work, assays, etc., so that a definite tonnage statement of present ore developed could be worked up. (Exhibit 12, p. 797.) Again in face of the further fact that this Company owed two hundred twenty-five thousand ($225,000) dollars, and that the Taylor contract was to secure by borrowing for the Company a sum sufficient to liquidate this indebtedness (p. 953); and Poole admitting that Taylor repeatedly stated that he was going to put this deal up to eastern bankers on a banking basis (pp. 480, 576–580). How could Poole testify so affirmatively, so in detail and so positively as to what took place in April in the Denver conference when he cannot recollect a serious charge of fraud against him made subsequently in June in the San Francisco conference?

As to Nenzel—we have pointed out that Nenzel's telegrams with reference to mine conditions were false. No attempt was made to justify them or to prove their truth. It is fair also to point out that the defendants' counsel carefully abstained from permitting Nenzel to testify to anything that occurred in the way of conferences, sending of telegrams or writing of letters prior to the conference in Denver on April 2d; thus counsel for plaintiff was foreclosed from cross-examination of Nenzel on all of the representations which he had made prior to that date.

STATEMENT BY TAYLOR OF QUANTITY OF ORE IN THE MINE.

Stress is laid by opposing counsel on the fact that from time to time Taylor, in circulars and in a paper used at the Denver conference (Exhibit "B"), referred to the ore blocked out in the mine in figures other than 60,000 tons. It seems to us sufficient to answer all arguments based on these grounds by stating—first, the admitted fact that Taylor was seeking to borrow money for this mine on a banking basis, and every reference to tonnage other than 60,000 tons is related to a statement that the tonnage mentioned will secure the amount of money requested to be loaned. For instance, in the letter to the Crucible Steel Company (Exhibit 32, p. 838), he speaks of an "assured minimum" of 43,000 tons. If there were a minimum, what was the maximum? The minimum was specified simply because on market values and on the basis of the proposition submitted in that circular letter, the amount of money Taylor sought for the mine was amply secured. The difference between the minimum so specified and the maximum of 60,000 tons represented to him, together with any future development beyond that point, was obviously the profit which the promoters hoped eventually to realize. In the Crucible Steel letter, Taylor concludes by requesting the Crucible Steel Company to loan one hundred twenty-five thousand ($125,000) dollars against concentrates to be produced from the mine and to be delivered at the rate of 25 tons per month. We cannot imagine Taylor, or any other business man, making a request

for one hundred and twenty-five thousand ($125,000) dollars unless some representations had been made to him as to an accurate, exact tonnage of commercial ore in the mine.

We do not need the plaintiff's testimony to corroborate this statement. We have the testimony of Mr. Poole to the same effect. If the Court will examine his testimony (Record, pp. 480, 2578) they will find that Poole admits that Taylor, at the Denver conference, discussed the necessity of the deal being on a banking basis and discussed tonnage with reference to the amount required at certain market values to secure the return to the lenders of the money to be borrowed. We believe that there is no single reference to any other tonnage than 60,000 that is not of a similar character. Exhibit "B" (p. 897), to which so much attention is paid by opposing counsel, is itself corroborative of our statement. It says: "In order to make investment save, only necessary to show at $8.00 market, 35,400 tons of ore; $10.00 market, 25,500 tons of ore" (Record, p. 480). We submit in conclusion that this argument of the defendants is no more than an attempt to convert Taylor's conservatism in dealing with the people from whom he sought to borrow money into an argument to relieve these defendants of positive fraud. If Taylor desired to fabricate his testimony and make it correspond with the figures represented by him to the Crucible Steel Company and others, nothing could have been easier—the Complaint and the proof in this case would have been 40,000 tons and not 60,000 tons.

The fact that he failed to do this is the best evidence that the representations were as alleged by Taylor.

TAYLOR CORROBORATED.

It is perhaps not in order to extend this reply brief by a further discussion of the evidence which corroborates Taylor's testimony. It is reviewed at length in our main brief. We think it is in order, however, to briefly call the Court's attention, first to the intrinsic improbability of no discussion of tonnage at the Denver conference. The trial Court (p. 1429) agrees with us that this was "unreasonable." Next, the most significant corroboration of Taylor's testimony is found in the comparison of the mine map (Exhibit "Y") brought to Denver by Poole and his associates with the plate 5, attached to Bancroft's first report (part of Exhibit 15). This plate shows transferred to it the same extensions shown on the mine map and figures of tonnage and detail of assays that were given to Taylor by Poole and much of it taken from the mine map, Exhibit "Y" (Record, pp. 553–561). The defendants admit that Poole gave Taylor data as to mine development, assays and values which were transferred by Taylor to the photostat plate, but claimed that Exhibit 15 was not the same photostat; that this data was given after the contract was agreed upon and was being typed. Poole throws in, for good measure, a statement—"I told him he could rely on the distances as they were made by Huntington but cautioned him about the values as being only estimates" (Record, pp. 514–547). Imagine a man

making this statement to another from or through whom he expects to borrow almost a quarter of a million dollars, a man who he admits said, and Taylor did say, at the Denver meeting that he was going into this deal on a banking basis and expected to put it up to New York bankers and trust companies.

Nenzel and Murrish also testified that no discussion of tonnage or values occurred until after the contract of April 2d was agreed upon and being typed—(Record, pp. 604, 608, 616, 617, 634, 635). They complete the perfect alibi of the guilty man and evidence the guiding hand of Murrish the lawyer—just as in the San Francisco conference when, according to the defendants' own testimony they remained silent when charged with misrepresentations until they could confer together and return advised what to say (pp. 611–613).

The fact that these defendants, at the San Francisco conference, were each charged with and *failed to deny* having misrepresented the condition of the mine to Taylor, is supported by the testimony, not only of Taylor, but of two corroborating witnesses, Bayless (pp. 128, 130) and Jackson (p. 424), and by the admission of two of the defendants, Nenzel (p. 610) and Murrish (p. 634).

We submit Taylor's version of the Denver conference must be taken as true.

TAYLOR UNDERSTOOD THE STATEMENT THAT THE MINE CONTAINED SIXTY THOUSAND TONS OF ORE WAS A REPRESENTATION OF FACT AND NOT AN OPINION.

Both briefs filed in this court on behalf of the appellees refer to certain testimony of Mr. Taylor to support an argument that all Mr. Taylor believed he was obtaining from Mr. Poole was the latter's opinion that the mine contained 60,000 tons of ore. There is no question but that the record does contain the questions and answers quoted by opposing counsel. We believe, however, that if the entire cross-examination of Taylor in this connection is read by this Court, bearing in mind that at the time Taylor had been subjected to a long cross-examination by a very distinguished counsel of great ability, assuming a legal significance of the word "opinion" far beyond any meaning intended by Taylor, that this Court will come to the conclusion that beyond a doubt Taylor believed that Poole was telling him a fact and that Taylor relied upon this statement as being a fact.

We quote from the record as follows (pp. 147, 148, 150, 151, 152, 154):

"Q. You believed that from such information as Mr. Poole had, that in stating to you, as you say he stated, that there was 60,000 tons of ore in sight, that he was giving you his best opinion?

A. I supposed he was stating the conditions of the mine.

Q. You didn't suppose, did you, that he had a knowledge as to what was in that block of ore, or that he could have any accurate knowledge from the data that you knew he then had, in view of the extent of the development of the mine?

A. I supposed Mr. Poole knew what he was talking about when he made statements to me as an engineer.

Q. You supposed he could see into the ground, and knew under those conditions as to how much ore was in sight, did you?

A. No.

Q. You supposed then, did you not, that you were merely getting his opinion, *based upon such development as then existed,* as to how many tons would probably be there?

A. Yes.

Q. And that was all you did expect to get from Mr. Poole on that point, wasn't it?

A. Yes. . . .

Q. Did he, as a matter of fact, express any opinion whatever to you?

A. He did.

Q. What did he say?

A. He told me very positively that there was over 60,000 tons of ore developed in the mine, which would average over 1.75 per cent tungstic acid.

Q. That that was his opinion?

A. It was his statement. . . .

The COURT.—You may repeat any conversa-

tion you had which would indicate whether it was an opinion or a positive statement.

A. His statement was very positive it was over 60,000 tons.

The COURT.—That is your opinion, repeat now just what was said.

A. I could not repeat his exact words, your Honor.

Q. Give it as near as you can.

A. Well, I don't know that I can say anything further than that he stated, said there was, his words would have been these: 'There are 60,000 tons of ore that will average over 1.75 per cent developed in the mine.' The opinion was expressed by all of them that that probably was not the maximum amount of ore, that additional ore could be expected, but that that was proven and developed at that time.

Mr. WHEELER.—Q. What did you understand him to mean when he said that ore was developed at that time?

A. I understood that he meant ore that was blocked out.

Q. What do you mean by blocked out?

A. Well, I should say was proven in the mine, that you could count on that tonnage of ore being there definitely.

Q. Was proven that it is probable or definite?

A. I should say blocked out would mean definite.

Q. So notwithstanding the map that was shown you, the extent of the workings and such

experience in mining matters as you had had up to that time, you understood that it was represented to you that 60,000 tons of ore was blocked out in that mine?

Q. Yes, sir. . . .

Q. At any rate, you wish it understood that you implicitly believed from that moment forward that it was an assured fact, and not a mere matter of Mr. Poole's opinion, that that quantity of ore, to wit, 60,000 tons, of the assay value of an average of 1.75 was surely in that mine?

A. Yes, sir. . . .

Q. But from that moment forward the question did not enter your mind—your mind—but that there was at least 60,000 tons there?

A. No, it did not; I had implicit confidence in Mr. Poole's statement.

Q. You believed that implicitly; and from that moment forward you were prepared to represent to any person whom you invited in that there were 60,000 tons of ore there?

A. I was prepared to, and did so."

If the Court will bear in mind that this testimony of Taylor relates to statements made to him by a mining expert in charge of operations at the mine, and who had brought, in response to Taylor's request, "exact data as to development work, assays, etc. (Exhibit 12, p. 798)," we submit that the conclusion is inevitable that Taylor took this statement by Poole as statement of fact and of the exact condition of the mine at the time of this conference in Denver.

RELIANCE ON BANCROFT.

It is urged by appellees that Taylor relied upon Bancroft, the mining engineer, and upon examinations to be subsequently made by him and not upon the representations made by the defendants. The appellees must know that this is not the fact because just previous to the Denver meeting and after it had been arranged by telegrams and letters and before the defendants left for Denver, they received a telegram from Taylor in which he said: "Bancroft's plans changed At Palace Hotel San Francisco today He may or may not come back via Denver Stop However *do not believe his presence necessary for proposed conference* Would be glad to see Messrs. Poole Murrish and Nenzel." (Exhibit 52, p. 891). Moreover, it is undisputed that Taylor, following the making of the contract of April 2d (Exhibit 16) at once proceeded to try to raise the money for these corporations. As reviewed at length in our opening brief, Taylor first sought to borrow the money in Denver, then went to the mine so that he could assure prospective investors that he had seen the mine and that it was a working proposition; then he went to New York, where he conferred with various people for the purpose of interesting them in the proposition; he employed counsel both in New York and San Francisco, and sent substantial amounts of money, approximately six thousand seven hundred ($6,700) dollars (Exhibit 27, p. 833) for traveling, hotel bills and in other directions, all before any report had been received from Bancroft, and much of it before

Bancroft was employed to make his second examination. It is also undisputed that Bancroft was employed not at Taylor's suggestion, nor on his initiative, but at the instance of Thane, an associate of Taylor in the contemplated deal, who was to subscribe twenty-five thousand ($25,000) dollars (pp. 176, 178).

Reliance is not a mere mental attitude; it consists in the acts done pursuant to representations. The authorities contained in our opening brief establish beyond a doubt that it is not necessary that Taylor should have relied *solely* on the representations made by the defendants. It is sufficient to support his cause of action if they were an inducing cause.

The point is made by appellees that Taylor's demand is unconscionable. They neglect, however, the fact that Taylor had come to the rescue of the Mines Company with large loans (see contract, Exhibit "A," attached to Complaint, p. 1148) that he made loans to it without security (pp. 621, 622, 625), and this at a time when the tungsten market was demoralized (see Exhibit 1, page 779, and Exhibit "C" attached to Complaint, p. 1161). No fiduciary relationship existed between the parties, the defendants were all men of experience in the business world and a large part of Taylor's proposed compensation was to be used as a bonus to obtain loans or effect sales of stock (pp. 187, 191, 928). That Taylor's contract and demand were neither conscionable nor unreasonable is shown by the fact that he was willing to go forward with the deal if forty

thousand tons of commercial ore was available. This left a small margin over the thirty-five thousand tons necessary to pay the debt (Exhibit "B") at an eight dollar market. A five thousand ton margin was the equivalent of thirty thousand dollars ($30,000). If Taylor had retained sixty-two per cent (62%) and given none of his stock away as a bonus, his share of it would have been but eighteen thousand dollars ($18,000). He had spent approximately sixty-seven hundred dollars ($6700) for expenses. His net return at that time would have not been in excess of twelve thousand dollars ($12,000)—a bare profit of five per cent (5%) on the transaction. Moreover, Taylor at the San Francisco conference, when it was found that there was only about nineteen thousand ($19,000) tons of ore on hand, offered to advance seventy-five thousand dollars ($75,000) towards the payment of the debts and an additional ten thousand dollars ($10,000) for working capital and future development of the mine, and to pay and advance additional amounts from time to time as ore was developed and exposed in the properties.

In conclusion we submit the following authority as aptly meeting the situation presented:

In McGowan vs. Parrish, 237 U. S. 285, an equity suit was commenced in the Supreme Court of the District of Columbia by McGowan and Brookshire, two attorneys, as complainants, against appellee as executrix of Joseph W. Parrish, deceased, together with the Secretary of the Treasury and the Treasurer of the United States. The object of the suit

was to establish and enforce a lien upon the fund of $41,000, which was paid by the Government for services rendered by the complainants in the prosecution of the claim. An agreement in writing was made between Parrish and McGowan whereby the former employed the latter as his attorney to prosecute and collect the claim, agreeing in consideration of the professional services to be rendered by McGowan and others whom he might employ in the prosecution of said claim that he, Parrish, would pay to McGowan a fee equal in amount to fifteen per cent of whatever might be awarded or collected. Later, by consent of both parties, Brookshire, also an attorney, was engaged to co-operate with McGowan, the latter making an agreement with Brookshire giving him an undivided one-third interest in the contract, the purpose being to give him five per cent of whatever amount should be awarded or collected upon the claim. Thereafter, McGowan and Brookshire co-operated and unquestionably rendered services of value. They succeeded in having the claim allowed by the auditors for the War Department. The Secretary, however, made further investigation and decided to refuse to pay the amount ascertained by the auditors, or any sum. Shortly after this, friction and disagreements developed between Parrish and the attorneys respecting the next steps to be taken, and they continued until Parrish's death. No active steps were taken during this period toward pressing the claim. Parrish's daughter was appointed executrix of his estate and she employed other counsel, with the result that eventually $41,000

was allowed and paid on the claim. McGowan and Brookshire wrote the executrix offering to proceed with the prosecution of the claim and asking her co-operation. She, on the other hand, contended that they had abandoned the prosecution of the claim and refused to have anything further to do with them.

The pertinent portions of the opinion in this case are:

1. With reference to the jurisdiction of a Court of Equity, the Court at p. 296 says:

> "The simple issue that remained was, of course, of such a nature that it would have been the proper subject of an action at law, had it not originally been bound up with questions appropriate for decision by an equitable tribunal, but 'a Court of Equity ought to do justice completely, and not by halves'; and a case once properly in a Court of Equity for any purpose will ordinarily be retained for all purposes, even though the Court is thereby called upon to determine legal rights that otherwise would not be within the range of its authority. (Camp vs. Boyd, 229 U. S. 530, 551, 552 and cases cited)."

and

2. With reference to the right to recover compensation for services and the amount thereof where the person is precluded from completing the services rendered through the fault of the other party. As to this question the Court at p. 299 says:

"The evidence further shows that the executrix had been fully cognizant, during her father's lifetime, of the general situation respecting the ice claim and knew that McGowan and Brookshire were the attorneys in charge of it; she knew Mr. McGowan had advanced considerable sums to her father for his support and hers, and that these advances remained unpaid at his death; the letter of November 19th and a copy of the reply were among her father's papers and came to her knowledge not long after his death; *and the circumstances show that she was not willing that McGowan or Brookshire should have anything further to do with the claim, and that they were made aware of this. We think they were not called upon to make an express offer of their services to the executrix.*

Complainants are, therefore, entitled to compensation; and since the attorneys' services were admittedly of great value, and resulted in securing to Mr. Parrish, as this Court in effect held in 214 U. S. 90, 124, a complete right to the payment of the money, *and since it was his fault and not theirs that the final steps to recover it were not taken by them, no reason is shown why complainants should not receive the entire amount stipulated for in the contracts.* (Italics ours.)

We respectfully submit that the decree of the District Court should be reversed.

Respectfully submitted,
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